

## **AN UPDATE ON PROFESSIONAL RESPONSIBILITY IN MENTAL COMMITMENT CASES: KGF AND BEYOND**

### **A. Time—It's not on our side. Do you want it good or fast?**

In many jurisdictions, attorneys have very little time to do any preparation before the initial appearance and still others even before the trial or hearing on the merits.

KGF, 2001 MT 140; 306 Mont. 1; 29 P.3d 485 (2001), encourages attorneys to freely and liberally request a reasonable amount of time for investigation and case preparation. See KGF at P76. However, attorneys are faced with a dilemma—if we request additional time, our clients remained detained, locked in facilities where they don't want to be and which they are fighting to get out of. Clients must have effective representation, but also don't want to take too long while client remains detained.

In KGF, initial appearance was held same day that counsel was appointed, and the hearing on the Petition held the next day. What is happening procedurally across the state. Do attorneys feel that they have time to prepare? Are clients upset when additional time is requested? It is important to remember that sometimes additional delay can work in the client's favor. The client may begin to take medications and their condition improve which may result in the Petition being dismissed or at least facilitate a community commitment as opposed to commitment to MSH.

### **Audio-visual communication Effective 10-1-09**

Section 53-21-140, M.C.A. has been amended to leave it to the Court's discretion as to whether the initial hearing is held via audio-video communication. The Respondent/ Respondent's counsel no longer have the right to object, but the professional person may object. However, the Respondent may object to the use of audio-video communication in any subsequent proceeding.

**Diversion to short-term inpatient treatment**

Amendments to Sections 53-21-122, 53-21-123 and 53-21-162, M.C.A.--

**Effective July 1, 2009**

Section 53-21-122, M.C.A. has been amended to require at the initial hearing that when a Respondent is advised of his/her rights, they must also be advised that when the professional person issues a report regarding their examination, the professional person must include in the report a recommendation about whether the respondent should be diverted from involuntary commitment to short-term inpatient treatment.

Section 53-21-123, M.C.A. has been amended to provide that the professional person appointed to conduct the evaluation must include in his/her report a recommendation about whether the Respondent should be diverted from involuntary commitment to short-term inpatient treatment. If the professional person recommends diversion from involuntary commitment to short-term inpatient treatment, the court must suspend the commitment hearing, unless the county attorney or respondent's counsel objects within 24 hours of receiving notice of the professional person's recommendation.

**B. Attorney Client Relationship**

MRPC 1.2(a) states that an attorney shall abide by the client's decisions concerning objectives of their representation and must consult with the client regarding the means by which these are pursued.

Rule 1.14—An attorney representing a client that is mentally ill or under some disability must maintain a normal attorney-client relationship as far as reasonably possible, even when the client's ability to make decisions is impaired.

Attorneys representing clients in civil commitment cases must strive to carry out our clients' wishes and maintain as normal of an attorney-client relationship as possible. At times this can be very difficult where the client is so mentally ill that he/she is not grounded in reality and may not even be capable of exercising his or her rights or making competent decisions.

(Share examples of difficulties experienced, comments, suggestions)

### **C. Role of the Friend of Respondent**

Section 53-21-122(a), M.C.A. previously required the court to appoint a friend of respondent. The amended version of this statute, which became effective March 25, 2009, makes the appointment of a friend discretionary. The new version of the statute reads:

"If the court finds that an appropriate person is willing and able to perform the functions of a friend of respondent as set out in this part and the respondent personally or through counsel consents, the court shall appoint the person as the friend of respondent. The friend of respondent may be the next of kin, the person's conservator or legal guardian, if any, representatives of a charitable or religious organization, or any other person appointed by the court. Only one person may at any one time be the friend of respondent within the meaning of this part. The court may at any time, for good cause, change its designation of the friend of respondent. The court shall change the designation of the friend of respondent at the request of the respondent or if it determines that a conflict of interest exists between the respondent and the friend of respondent.

Section 53-21-102(8), M.C.A. defines the friend as:

"[A]ny person willing and able to assist a person suffering from a mental disorder and requiring commitment or a person alleged to be suffering from a mental disorder and requiring commitment in dealing with legal proceedings, including consultation with legal counsel and others."

This statute was amended, and the new statute became effective on March 25, 2009.

The friend is there to help the Respondent in dealing with the legal proceedings, including consultation with legal counsel and others. See In re D.V., 2007 MT 351, P34; 340 Mont. 319, P34; 174 P.3d 503, P34.

Don't forget that the friend of the Respondent is just that, a friend of *Respondent*. The person is not a friend of the court and does not serve the same function as a visitor in a guardianship proceeding. They should not be communicating with the state or with the court regarding any communications they have with the Respondent and Respondent's counsel.

JDL, 2008 MT 445 and ASF, 2008 MT 450, trial court committed reversible error by not appointing a friend of Respondent.

However, given the amendment to Section 53-21-122, appointment of a friend is no longer mandated by statute.

What is happening across the state? How is the friend being used? Who is serving as the friend when no friend/family member of Respondent is available and willing to serve?

### **Who should serve as friend?**

In re D.V., 2007 MT 351

Court ruled during trial that it was a conflict for the Respondent's mother, who had been appointed to serve as friend, to testify against him, and sustained counsel's objection to her testimony. However, on appeal, commitment was overturned because trial just failed to appoint another person to serve as friend when it was determined that the friend was also the complaining witness who had initiated the Petition against Respondent and thus had a conflict of interest.